Supreme Court, U.S.
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No. 91-2044

In The

Supreme Court of the United States

October Term, 1992

DENNIS MERLE LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Six

REPLY TO BRIEF IN OPPOSITION

October 30, 1992

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ARGUMENT

Respondent misstates both facts and law pertinent to this Court's consideration of petitioner's request for certiorari.

1. Respondent incorrectly asserts (Resp. Br. at 9 n.1) that the trial judge declined to consider the constitutionality of the Seller Assisted Marketing Plan Act ("SAMP Act") as applied to petitioner. As noted in the Appendix to the Petition for Writ of Certiorari at 19 ("App."), the trial judge ruled on September 26, 1989 that the SAMP Act "as applied to this case is constitutional." The California Court of Appeal would need to make no additional factual findings to review that constitutional ruling of the trial court.

2. Respondent wrongly argues (Resp. Br. at 13-14) that petitioner waived his right to challenge the constitutionality of the SAMP Act as applied to him because there was no explicit "as applied" reference in the plea bargain interchanges between the trial judge, petitioner, district attorney, and defense attorney. But the plea bargain came on the heels of the trial judge's rejection of a constitutional attack on the SAMP Act as applied to petitioner. *See* App. 19. Thus, the trial court contemplated an appeal challenging that "as applied" ruling in stating, ". . . the only grounds on appeal that appears to be actively sought in this case is the unconstitutionality of the law that relates to this whole thing." App. 76. The reference to "this whole thing" is most reasonably interpreted to mean petitioner's entire case, not a facial attack on the constitutionality of the SAMP Act, an issue the trial judge never addressed.

As respondent notes (Resp. Br. at 13-14), the district attorney referred to an appellate constitutional attack "on this code," a reference that suggests the possibility of a facial challenge to the SAMP Act. But the district attorney never communicated to petitioner any understanding that his guilty plea would waive his right to seek review of the trial judge's ruling upholding the constitutionality of the SAMP Act "as applied to this case." Indeed, she expressly informed petitioner through interrogation that his guilty plea waived only three constitutional rights: the right to a jury trial; the right to confront and cross-examine witnesses; and, the right against self-incrimination. App. 79. Petitioner's counsel then clarified without provoking any dissent: "So those are the only constitutional rights which the defendant is giving up at this time based on this plea. And he is not giving up any of his appellate remedies other than the waiver of the three rights specifically enumerated. . . ." App. 82.

3. Petitioner thus reasonably believed the plea bargain preserved his right to challenge on appeal the trial court's holding that the SAMP Act was constitutional "as applied to this case." Even assuming some ambiguity in the plea bargain on this score, the doctrine of lenity militates in favor of adopting petitioner's reasonable understanding.

Due process requires that a defendant be advised of and understand the consequences of a guilty plea. *United States v. Salmon*, 944 F.2d 1106, 1130 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1213 (1992); *United States v. Pearson*, 910 F.2d 221, 223 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 977 (1991); *United States v. Briggs*, 939 F.2d 222, 227 (5th Cir. 1991). Petitioner was affirmatively led to believe his

guilty plea preserved a right to appeal the trial judge's rejection of his constitutional attack on the SAMP Act as applied to his case. The failure of the State of California to honor petitioner's understanding violated due process. *Santobello v. New York,* 404 U.S. 257 (1971).

CONCLUSION

Respondent's brief reinforces the conclusion that this Court should grant the Petition for a Writ of Certiorari regarding Question 2, vacate the judgment, remand to the California Court of Appeal, and instruct that court either to permit petitioner to withdraw his guilty plea, or to entertain his constitutional attack on the SAMP Act as applied to his case.

Respectfully submitted,

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